

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

77-4083

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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THE LONG ISLAND COLLEGE HOSPITAL,	:	
Petitioner,	:	
- against -	:	Petition to Review
NATIONAL LABOR RELATIONS BOARD,	:	and Set Aside an
Respondent,	:	Order of the National
	:	<u>Labor Relations Board</u>
and	:	Docket No. 77-4083
LOCAL 144, HOTEL, HOSPITAL, NURSING	:	77-4099
HOME AND ALLIED SERVICES UNION, SEIU,	:	
AFL-CIO,	:	
Respondent-Intervenor.:	:	

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PETITIONER'S REPLY BRIEF

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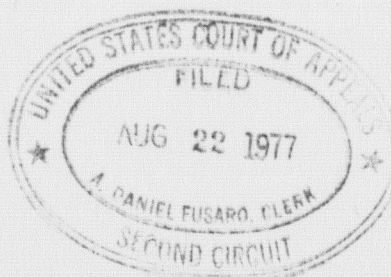


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	:	and Cross Petition to
	:	<u>Enforce that Order</u>
LOCAL 144, HOTEL, HOSPITAL, NURSING	:	Docket Nos. 77-4083
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AFL-CIO,	:	
Respondent-Intervenor.	:	

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PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

Our principal brief shows in compelling detail why this Court should not honor the Board's and the Union's request to "rubber-stamp" its approval of the Board's abdication of its statutory duty to decide the bargaining unit and fair election questions this case presents. To do so would defy the Supreme Court's command that

"Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative

decisions that they deem i consistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. ****

[W]here, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" NLRB v. Brown, 380 U.S. 278, 291-92 (1965) (citation omitted). Accord, St. John's Hospital v. NLRB, 95 LRRM 3058, 3060 (10th Cir. 1977) (not yet reported officially).

We suggested that for reasons the National Labor Relations Act ("Act") does not allow, the Board wants to side-step its duty to decide bargaining unit and fair election questions where a state agency has passed on them even though under a different statute based on different policies and where, as here, no stable collective bargaining relationship would be affected.

The Third Circuit's decision in Memorial Hospital of Roxborough v. NLRB, 545 F.2d 351 (3d Cir. 1976) correctly told the Board that it may not refuse "to exercise its discretion as to an appropriate unit in each and every case"

and that "[t]his responsibility can neither be delegated to nor discharged by a state agency where [, as here,] Congress has sought to create a national labor policy by vesting this discretion in a national board." 545 F.2d at 360.* But this Board has refused to heed the Third Circuit (521)** and again subbornly seeks to have this Court of Appeals disregard the correct decision of a sister circuit. Stubborn rejection of judicial authority is a longstanding, recently reaffirmed policy of the Board,*** but this Court should not permit the Board to adhere to this policy in this case. This Court, like the Third Circuit, should tell the Board to perform the duty Congress gave to it to decide the questions in this case.

* The Union claims on page 20 of its brief that Otis Hospital Inc., 219 NLRB 164, 89 LRRM 1545 (1975), holding that the Board normally will honor the parties' bargaining unit stipulations even if inconsistent with its usual unit rules, is "surely not in keeping with the Third Circuit's interpretation of §9(b)". But the Third Circuit answered this argument in footnote 11 of its decision, 545 F.2d at 360 n. 11, by citing Otis Hospital and pointing out that the parties' bargaining unit stipulation is a "factual circumstance" upon which the Board properly may rely in reaching its bargaining unit decisions.

** Numbers in parentheses refer to pages of the Joint Appendix.

*** "With all due respect to the First, Fourth, and Seventh Circuits, we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining". Ford Motor Co., 230 NLRB No. 101 at 6, 95 LRRM 1397, 1399 (July 11, 1977).

ARGUMENT

POINT I

JUDICIAL AUTHORITY AND THE
BOARD'S OWN CASES COMPEL THE
CONCLUSION THAT THE BOARD MAY
NOT GRANT COMITY TO STATE AGENCY
DECISIONS CONCERNING BARGAIN-
ING UNITS IN CONTESTED CASES,
BUT MUST DECIDE THOSE BARGAINING
UNIT QUESTIONS ITSELF

The Board relies on a number of its own cases in point I of its brief as authority for its position that it may grant comity to state labor relations board holdings concerning what constitutes an appropriate collective bargaining unit, but none of those cases is in point and none permits it to abdicate its statutory duty and defy the statutory command that "[t]he Board shall decide in each case...the unit appropriate for the purposes of collective bargaining...." Act §9(b), 29 U.S.C. §159(b) (emphasis added).

- A. Before Its Memorial Hospital of Roxborough Decision Which the Third Circuit Reversed, The Board Never Granted Comity To a State Agency Decision Involving An Appropriate Bargaining Unit Issue.
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We have show, on pages 33-34 of our principal brief, that neither Bluefield Produce & Provision Company, 117 NLRB 1660, 40 LRRM 1065 (1947), nor The West Indian Company, 129 NLRB 1203, 47 LRRM 1146 (1961), nor Screen

Print Corporation, 151 NLRB 1266, 58 LRRM 1641 (1965) was a case where the Board granted comity to a state agency's bargaining unit determination. In each of them the employer and the union agreed to the unit in which the state agency conducted the election and no one contested the unit issue before the state agency.

The Board's appellate counsel now seek to shore up the cases on which the Board relied by citing additional, inapposite Board and Circuit court cases none of which involves a bargaining unit question. Thus, in Mercy-Memorial Hospital, 221 NLRB 1, 3, 90 LRRM 1611, 1612 (1975), the employer and the union had agreed to the bargaining unit before the Michigan labor board. Nor was a bargaining unit question before the Court in Methodist Hospital v. New York State Labor Relations Board, 382 F. Supp. 459 (S.D.N.Y. 1974), or Getreu v. Bartenders and Hotel and Restaurant Employees Union, 181 F. Supp. 738, 741 (N.D. Ind. 1960) on which the Board's appellate counsel also relies.

Similarly, no unit question was before the state agency in Intalco Aluminum Corporation v. NLRB, 417 F.2d 36, 40 (1969), or in NLRB v. Western Meat Packers, Inc., 350 F.2d 804 (10th Cir. 1965), the former involving only the validity of a state agency's certification based on a check of authorization cards, which the Board and the Court

found invalid because two unions were competing for the employees' affections, and the latter involving only the validity of the second of two representation elections the state agency conducted in the same uncontested bargaining unit within 12 months, the Board finding the second state election valid and the Court reversing because the Act forbids two elections within 12 months where the first election is valid.

Further, in St. Joseph's Hospital, 221 NLRB 1253, 91 LRRM 1074 (1975), enforced mem., 542 F.2d 495 (8th Cir. 1976), where the Board granted comity to the Minnesota labor board's placing the hospital's admitting clerks in a bargaining unit the union already represented, no one questioned whether or not the admitting clerks properly were part of the pre-existing unit, the only question raised being the procedure the state agency followed when it added the admitting clerks to the union's bargaining unit.

Finally, in NLRB v. St. Luke's Hospital Center, 551 F.2d 476 (2d Cir. 1976), on which the Board's appellate counsel also relies, this Court upheld the Board's refusal to grant comity to the SLRB's placing professional employees in a bargaining unit with non-professional employees without giving the professional employees a chance to vote on the

question of whether they favored such inclusion, as the Act requires. Act §9(b)(1) 29 U.S.C. §159(b)(1). In so holding, the Court commented that

"Arrangements resulting from state agency proceedings should generally be respected if consistent with federal policy. See Cornell University, 183 N.L.R.B. 329, 334 (1970). 'Comity' in this sense reflects the desirability of supporting settled bargaining relationships in the absence of compelling countervailing reasons. It is clear, however, that the NLRB is not required to defer to state proceedings where federal policy would be undermined." 551 F.2d at 482. (emphasis added).

Moreover, in Cornell University, supra, the Board approved a state sanctioned service and maintenance bargaining unit to which the employer and the union had "virtually stipulated", and the parties had "urged the Board to honor..." the state certification. 183 NLRB at 334, 74 LRRM at 1275. No one questioned the state's bargaining unit determination and, as the Court correctly noted, the Board's grant of comity not only was in accord with both parties' wishes, but also supported a settled bargaining relationship. Indeed, the parties voluntarily "were engaged...in collective bargaining." Certainly, the Court's dictum concerning comity cannot aid the Board here because the Hospital never has agreed to the SLRB's maintenance unit finding, and there is no "settled relationship" between the

Hospital and the Union to support. Here, unlike the employer and the union in Cornell University, supra, bargaining took place only "under the shadow of state compulsion" [NLRB v. Western Meat Packers, Inc., 350 F.2d 804, 806 (10th Cir. 1965)] without prejudice to the Hospital's position that the maintenance unit was not appropriate (6, 141, 355-56).

Moreover, here as in NLRB v. St. Luke's Hospital Center, supra, granting comity to the SLRB's stale and improper certification of a balkanized maintenance unit would undermine federal policy against proliferation of bargaining units at hospitals and in favor of a uniform policy applicable to labor relations at hospitals throughout the nation. See our principal brief at 30-33. See also, State of Minnesota, 219 NLRB 1095, 1097, 89 LRRM 1785, 1787 (1975)*.

* We note the Board's and the Union's misstatements on pages 11 to 15 and page 12 of their respective briefs that Section 705(2) of the New York Labor Law and Section 9(b) of the Act are "essentially identical" and that the SLRB's election among the Hospital's maintenance employees was "quite similar" to the Board's own Globe elections. In the first place, as the New York Court of Appeals holding quoted at page 20 of the Board's brief shows, the SLRB's unit finding was compelled by its desire to avoid the mandatory craft unit proviso of Section 705(2), which is not in the Act. In the second place, as the cases the Board cites in note 14 on page 13 of its brief show, the Board's Globe elections make unit placement depend on the union chosen not, as in the SLRB's election, on the result of a separate question concerning unit placement. In fact, in the SLRB's election, a majority of the valid ballots cast were not in favor of a separate maintenance unit and, if the SLRB had followed the Board's Globe election procedure, the maintenance unit would have been found inappropriate and the Union would not have been certified. See our principal brief at 7-8 and 44.

B. The Board Does Not Defer to Arbitrators' Decisions With Respect to Appropriate Bargaining Units.

The Board's counsel, at pages 15 to 17 of their brief, ask this Court to accept their misstatement that the Board, with court approval, will defer to an arbitrator's bargaining unit finding, and that therefore this Court should defer to the SLRB's bargaining unit finding at the Hospital. But nothing could be wider of the mark than this argument based on inapplicable and overruled cases.

In the first place, the Court, in Carey v. Westinghouse Electric Corporation, 375 U.S. 261 (1964), held that what the Court called either a jurisdictional dispute or a dispute about which union should represent employees doing particular work initially should be submitted to an arbitrator since the parties had agreed to arbitration in their contract. However, and more significantly, the Court also held that "[s]hould the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would of course, take precedence...." 375 U.S. at 272 (emphasis added). In fact, in that very case, the Board did "disagree with the arbiter" and rejected his bargaining unit determination. See Westinghouse Electric Corporation, 162 NLRB 768, 771, 64 LRRM 1082, 1083-1084

(1967), where the Board noted that it had "limited the scope of Raley's", Inc., 143 NLRB 256, 53 LRRM 1347 (1963), on which counsel for the Board in this case would have this Court rely to find, contrary to fact and law, that the Board, with court approval, accepts arbitrators' bargaining unit determinations.

Moreover, the Board later overruled Raley's in Hershey Foods Corporation, 208 NLRB 452, 85 LRRM 1312, enforced mem., 90 LRRM 2890 (3d Cir. 1974) (not reported officially). There the Board adopted the decision and recommended order of its administrative law judge who held that the Board's decisions after Raley's* in "which the Board ha[d] declined to defer to arbitral awards where [unit questions were] in issue...must...be deemed to supersede Raley's...." 208 NLRB at 457. Accord, Germantown Development Co., Inc., 207 NLRB 586, 587, 84 LRRM 1495, 1497 (1973).

This Court's decision in NLRB v. Horn & Hardart Co., 439 F.2d 674 (2d Cir. 1971), upon which the Board also relies, is not to the contrary. There the Court accepted

* Combustion Engineering, Inc., 195 NLRB 909, 79 LRRM 1577 (1972); Woolwich, Inc., 185 NLRB 783, 75 LRRM 1191 (1970); Textron, Inc., 173 NLRB 1290, 70 LRRM 1023 (1968); Beacon Photo Service, Inc., 163 NLRB 706, 64 LRRM 1439 (1967); and Pullman Industries, Inc., 159 NLRB 580, 62 LRRM 1273 (1966).

the Board's refusal to follow an arbitrator's bargaining unit determination, referred to the Note in the Yale Law Journal cited at page 30 of our principal brief, which showed that the Board no longer deferred to arbitration awards in bargaining unit cases, and noted that the Board already had limited Raley's, which the Board finally overruled three years later.

We note too that a bargaining unit question was not involved in either Spielburg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955), where the Board deferred to an arbitrator's award in an ordinary unfair labor practice case, or in Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964), where the Court accepted the Board's deferring to an arbitrator's award in another ordinary unfair labor practice case.

Finally, this Court's approval, in Lodge 700, IAM v. NLRB, 525 F.2d 237 (2d Cir. 1975), and Nabisco, Inc. v. NLRB, 479 F.2d 770 (2d Cir. 1973), of the Board's decision in Collyer Insulated Wire Co., 192 NLRB 837, 77 LRRM 1931 (1971) to defer to the arbitration process while retaining jurisdiction in case the arbitrator's decision violates the policies of the Act does not support the Board's contention that it has the right to defer to arbitrators' decisions of bargaining unit issues, much less that it has the

right to defer to state agency determinations in contested bargaining unit cases where no collective relationship has resulted. Neither Lodge 700 nor Nabisco involved a bargaining unit issue, and the deferral policy the Board expressed in Collyer Insulated Wire Co. would never have been adopted if it had been designed to apply to bargaining unit questions since Member Brown, whose concurring opinion was necessary for the Board to adopt the deferral policy, expressly held that the deferral policy should not apply to bargaining unit issues. 192 NLRB at 845, 77 LRRM at 1940.

In short, neither the comity cases nor the arbitration or grievance machinery cases upon which the Board relies support the Board's contention that the Act permits it to abdicate its responsibility to decide contested bargaining unit or fair election cases to any other tribunal -- whether that tribunal is established by state law or by agreement of the parties. The Act requires the Board to decide such cases, and its failure to do so here compels this Court to set the Board's bargaining order aside.*

* Contrary to the contentions of the Board and the Union (Board brief at 23, Union brief at 22), the Hospital is not trying to relitigate questions the SLRB decided under the New York Labor Law. The Hospital is litigating questions under the Act for the first time, is seeking the Board's determination of those questions, but the Board is unlawfully refusing to make that determination.

- C. The Legislative History To Which The Board and The Union Refer Expressly States That The Board, Not Some Other Body, Must Decide Contested Bargaining Unit Issues.

We will not repeat here, but we ask the Court to refer to, the legislative history of Public Law 93-360 that the Board cites at pages 18 and 19 of its brief and the Union cites at pages 14 and 15 of its brief. Each excerpt the Board and the Union quote states expressly that the Board -- not some other body -- has discretion to fashion bargaining units at hospitals. While we contend that the facts of this case compel the Board to exercise its discretion in favor of a service and maintenance unit at the Hospital, the fact remains that the Board brags that it has refused to exercise any discretion on the unit question and, for that reason, its order may not be enforced.

- D. Neither the Board nor the Union Has Answered, Because They Cannot Answer, Our Contention That The Special Circumstances At The Hospital And The SLRB's Stale Certification Must Be Viewed As A Whole To Determine Whether Even The Board's Own Roxborough Test for Granting Comity To State Agency Bargaining Unit Determinations Has Been Met.

Both the Board and the Union argue that each of the special circumstances to which we refer at pages 11 to 15 and 47 to 50 of our principal brief -- viewed in isolation -- does not prevent giving comity to the SLRB's stale certification in this case, but even if this were true, which it is not,

the Court should view these circumstances as a whole -- not separately -- to determine whether, if the Court were mistakenly inclined to disregard the Third Circuit's holding in Memorial Hospital of Roxborough, supra, comity should be granted under the Board's own comity standards. All the circumstances in this case must be viewed as a whole in determining whether the Board's order should be enforced and that 13 years of change at the Hospital, the fact that few of the maintenance employees who voted in the SLRB election remain and the 13 years that have passed since the SLRB issued its certification should compel the Court to disregard the Board's comity doctrine regardless of how it might otherwise regard it in the ordinary case. See the cases we cite at page 49 of our principal brief. Neither the Board nor the Union answers this argument because neither can do so.

POINT II

THE MAINTENANCE UNIT THE SLRB FOUND APPROPRIATE 13 YEARS AGO IS INAPPROPRIATE UNDER THE ACT AND THE BOARD'S OWN STANDARDS. HENCE THE BOARD WOULD NOT HAVE CONCLUDED THAT THE HOSPITAL'S MAINTENANCE EMPLOYEES ARE AN APPROPRIATE COLLECTIVE BARGAINING UNIT HAD IT CONSIDERED THE FACTS IN THE RECORD AS THE ACT REQUIRES IT TO DO

We repeat this point heading here only to emphasize the Board's admission at page 24 of its brief, that "[i]t is possible that the Board might have decided the unit issue differently, if this case had come before it initially as a representation proceeding in which the Union was seeking an election in a separate maintenance and engineering unit" and that "the important fact that distinguishes [the cases the Hospital cites at page 54 of its principal brief] from the instant one is that this decision is based on the principle of comity and a recognition of the past history of this proceeding."

In this connection, we call the Court's attention to still another Board case, the latest dealing with the issue of whether a maintenance unit may be appropriate at a hospital, Northeastern Hospital, 230 NLRB No. 162, 95 LRRM 1464 (July 21, 1977) where, under facts less compelling than those present here, the Board held that a unit limited to

maintenance employees was not appropriate for collective bargaining. There, as here,

"maintenance employees do not comprise a distinct and homogeneous group. Thus, maintenance employees' duties are confined largely to routine and uncomplicated maintenance work and are not specialized. Most major repair and maintenance work is contracted out to specialists. The Employer does not require maintenance employees to have apprenticeship or other training in trade schools or any special education beyond high school. None of the maintenance employees is a journeyman or master craftsman. Indeed, the Employer does not divide its maintenance employees on the basis of specialized skills, such as carpentry, electrical work, or plumbing. In addition, maintenance employees have much in common with other employees. They have a substantial degree of regular contact with other hospital employees, share the same fringe benefits, are recruited and screened for employment by the same employee relations department, utilize a common four-step grievance procedure, receive the same across-the-board raises, and have access to the same cafeteria." 230 NLRB No. 162 at 7-8, 95 LRRM at 1466.*

Thus, counsel for the Board is indeed correct -- were it not for the Board's improper use of comity as an excuse for failing to do its statutory duty the Board would

* On pages 65 and 66 of our principal brief we have reviewed and distinguished the maintenance unit cases the Board cites in note 15 on page 13 of its brief. We must point out, however, that in Nathan and Miriam Barnert Memorial Hospital Association, 217 NLRB 775, 784, 89 LRRM 1083, 1094 (1975), which the Board also cites in its note 15, the Board held that a service and maintenance unit was appropriate.

have (not "might have") "decided the unit issue differently". Hence, the Board's order flies in the face of the Congressional mandate that there must be a uniform national labor policy for voluntary hospitals* and, for that reason, if for none other, this Court should reverse the Board's decision here.

Nor does the so-called "collective bargaining history" here (Board brief at 24-25) support the Board. The "history" was "under the shadow of state compulsion" [NLRB v. Western Meat Packers, Inc., 350 F.2d 804, 806 (10th Cir. 1965)], and the Hospital bargained without prejudice to its position that the maintenance unit was inappropriate (6, 141, 355-56). No contract resulted. Hence, this "history" may not be used to foreclose this Court from correcting the Board's error.

However, we do acknowledge, in answer to the Union's argument at page 22 of its brief, that where, unlike here, an employer has bargained and reached a contract with a union, the Board may take this "settled relationship"

* The Board has accepted the Congressional mandate for a uniform national labor policy in other contexts. See, e.g., Russell Motors, 198 NLRB 351, 80 LRRM 1757 (1972), enforced in pertinent part, 481 F.2d 996, 1006-07 (2d Cir. 1973) (one interest rate on back pay awards applicable nationwide regardless of the lawful interest rate in the state where the violation occurred); Rabouin v. NLRB, 195 F.2d 906, 910 (2d Cir. 1952) ("[T]he vagaries of state rules of law may not override provisions of a federal act geared to the effectuation of important national labor policy.").

[NLRB v. St. Luke's Hospital Center, 551 F.2d 476, 482
(2d Cir. 1976)] into consideration in reaching its unit
determination. This would protect against disrupting
established bargaining relationships.

POINT III

THE BOARD'S EXTRAORDINARILY BROAD ORDER THAT NEITHER ITS GENERAL COUNSEL NOR THE UNION REQUESTED FURTHER SHOWS THE BOARD'S ARBITRARY AND CAPRICIOUS ACTIONS IN THIS CASE AND IN ALL EVENTS IS UNLAWFUL IN VIEW OF THE TECHNICAL NATURE OF THE ALLEGED VIOLATION.

The Board, but not the Union, in an attempt to support the extraordinary breadth of its order, accuses the Hospital of "obvious disdain for the statutory obligation to bargain" because the Hospital contested the SLRB's bargaining order and because the Hospital bargained for several months without prejudice to its position that the unit was inappropriate (Board brief at 28). But the Hospital's effort to test, in the only way it could, the validity under New York law of the maintenance unit the SLRB established, which the Hospital believed was inappropriate, and the Union's pre-election misconduct, which the Appellate Division found was reason to set the election aside, 39 App. Div.2d 913, 333 N.Y.S.2d 23 (2d Dep't 1972), does not constitute "disdain" for any statutory obligation. Indeed, like every citizen, the Hospital has the right to seek judicial review of administrative action without being accused of "disdain" for the very statute that creates that right. See New York Labor Law §§707(4), 716(6)(a). So too,

the Hospital now has the statutory right to contest under Section 10(f) of the Act, 29 U.S.C. §160(f), the appropriateness of a maintenance unit that the Board, in similar circumstances, has found inappropriate without being accused of "disdaining" its statutory obligations.

The Hospital, a not-for-profit corporation acting in the public interest, has a duty to insure that its employees have an opportunity to vote in a fair election and to insure that they are not balkanized into small bargaining units that, as the legislative history of the 1974 amendments to the Act correctly recognizes*, may disrupt patient care through jurisdictional disputes and strikes and improperly drive up the cost of patient care through "wage 'leap-frogging' and 'whipsawing'." This is not "disdain" for its statutory obligations.

Moreover, in none of the five cases the Board cited to support the breadth of its order here** had the

* Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 at 114.

** Morgan Precision Parts v. NLRB, 444 F.2d 1210, 1215 (5th Cir. 1971); Allegheny Pepsi-Cola Bottling Co. v. NLRB, 312 F.2d 529, 532 (3d Cir. 1962); Central Mercedita Inc. v. NLRB, 288 F.2d 809, 812 (1st Cir. 1961); Precision Fabricators, Inc. v. NLRB, 204 F.2d 567, 569 (2d Cir. 1953); NLRB v. Krimm Lumber Co., 203 F.2d 194, 196 (2d Cir. 1953).

employer done nothing except test the appropriateness of a bargaining unit, and in each of them the employer's several different violations of the Act had shown its proclivity to violate the Act.

In no event is a broad order appropriate in this case.



CONCLUSION

The Court should grant the Hospital's petition and set the Board's order aside. At the very least, the Court should remand the case to the Board with instructions to make its own decision under the Act concerning whether the maintenance employees at the Hospital are an appropriate collective bargaining unit and, if the Board erroneously finds that they are, to hold a new election under the Board's own election standards.

Respectfully submitted,

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